79-417

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1979

FIRST NATIONAL BANK OF MONTEREY,
Petitioner,

v.

FIRST UNION BANK AND TRUST COMPANY OF WINAMAC, INDIANA,
Respondent,

and

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND REQUEST FOR SUMMARY REVERSAL

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The petitioner, First National Bank of Monterey, respectfully moves this Court to summarily reverse the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on June 15, 1979, or in the alternative. that the Court issue a writ of certiorari to review that judgment and opinion of the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The Comptroller of the Currency rendered no formal written opinions or findings of fact, but did grant the application of petitioner for a branch bank on the basis of a certified administrative record.

The opinion of the Comptroller of the Currency dated 12-20-77. (Appendix A, p. 1a)

The order and decision of the District Court, upholding the action of the Comptroller of the Currency granting the petitioner's branch bank application (Appendix B, p. 9a) was not reported. Dated March 14, 1978.

The judgment and opinion of the Court of Appeals for the Seventh Circuit reversing the District Court (Appendix C, p. 13a) is as yet, unreported. Dated and entered June 15, 1979.

The order of the District Court on the Seventh Circuit's mandate, dated July 17, 1979. (Appendix D, p. 27a)

The decision of the District Court denying petitioner's emergency motions for a stay of execution of the Seventh Circuit mandate pending application for writ of certiorari was rendered orally and not reported. Rendered August 3, 1979.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Seventh Circuit reversing the judgment of the District Court for the Northern District of Indiana, South Bend Division, was entered June 15, 1979. (Appendix C, p. 13a)

The jurisdiction of the Court is invoked pursuant to U.S. Supreme Court Rule 19, 28 U.S.C.A. 28 U.S.C.A. §1254(1), 28 U.S.C.A. §2101(c), 28 U.S.C.A. §2106, and the Administrative Procedure Act, 5 U.S.C.A. §702, and

petitioner seeks summary reversal or in the alternative a writ of certiorari on a judgment and opinion rendered by the Court of Appeals for the Seventh Circuit on June 15, 1979.

QUESTIONS PRESENTED FOR REVIEW

The First Union Bank and Trust Company of Winamac, Indiana, brought this action in the District Court for declaratory judgment and injunctive relief, seeking to have set aside an order by the Comptroller of the Currency, which order approved the establishment of a branch bank by the First National Bank of Monterey. The District Court sustained the Comptroller's position on review under §706 of the Administrative Procedure Act. The Seventh Circuit reversed the District Court and failed to apply the standard of review as outlined by the relevant statutory and case law. The questions thereby arising are:

1. Whether the judgment and opinion of the Seventh Circuit Court of Appeals is in conflict with the decision of the Eighth Circuit Court of Appeals on the application of the standard of review of administrative agency decisions?

2. Whether the decision of the Seventh Circuit Court of Appeals on the issue of the existence of a "town", pursuant to Indiana Code §28-1-17-1, was completely contrary to the prevailing Indiana law, as held by the Supreme Court of Indiana in *Pendleton Banking Company* v. *Department of Financial Institutions,* 257 Ind. 363, 274 N.E.2d 705 (1974)?

STATUTES AND RULES PROVISIONS INVOLVED

12 U.S.C. § 36(c)
Burns Indiana Statute, Annotated Code Edition Title 28, p. 161; I.C. 28-1-17-1
5 U.S.C.A. § 702
5 U.S.C.A. § 706
Rule 19, U.S. Supreme Court Rules

The aforementioned Statutes and Rules are set out in full in the Appendix for the Court's convenience.

CONCISE STATEMENT OF THE CASE

After full administrative proceedings, the Comptroller of the Currency granted the petitioner-First National Bank of Monterey's request for establishment of a branch bank in an unincorporated area one-eighth of a mile north of the corporate limits of Winamac, Indiana, on Route 35. The First Union Bank and Trust Company of Winamac, Indiana, brought this action for declaratory judgment and injunctive relief, seeking to have the approval set aside. The District Court accepted jurisdiction pursuant to 28 U.S.C.A. §1331(a) and ruled in favor of petitioner-applicant bank, after requesting the Comptroller to investigate further and take evidence on the issue of whether or not the proposed location was a "town" as defined by Indiana case law. The Comptroller, accordingly, concluded that the area in which the branch was to be located consists of a linear cluster of from 20 to 25 residencies and four existing businesses along U.S. Highway 35, north of the corporate limits of Winamac. "I conclude that such proposed branch office will be located in a compact area having a number of persons living in close proximity to one another with some degree of business being transacted within the area, i.e. within

a town. The potential for future residential and commercial development, albeit only in its initial stages at present, serves to reaffirm my decision." (Opinion of the Comptroller of the Currency, Appendix A at p. 8a). Cross motions for summary judgment were filed, the District court granted defendants motions for summary judgment and denied plaintiffs motion for summary judgment. (Appendix B, p. 12a) The Winamac bank appealed the result, and the Seventh Circuit ultimately reversed the District Court's affirmance of the Comptroller's decision. The District Court entered its order on the Seventh Circuit's mandate, ordering the applicant bank to stop all banking activity at the branch site and further, for the Comptroller of the Currency to revoke the authority of the applicant-bank to conduct banking activities at the branch site. (Appendix D, p. 27a) The Monterey bank's emergency petitions to the District Court to vacate and stay this order were denied, and the bank filed this petition for alternative relief.

REASONS FOR GRANTING THE RELIEF

1. Within its decision, the Seventh Circuit departed from the statutory and case law with respect to review of a decision of an administrative agency.

The standard of judicial review of the Comptroller's decision is governed by the Adminstrative Procedure Act, 5 U.S.C.A. §706. (Appendix H, p. 32a) The reviewing court is limited in its scope of review, to a determination of whether the Comptroller's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Camp* v. *Pitts*, 411 U.S. 138, 141 (1973), *First National Bank of Crown Point* v. *Camp*, 463

F.2d 595, 599 (7th Cir. 1972), 5 U.S.C.A. §706(2) (A). "Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis." *Carlisle Paper Box Co.* v. *N.L.R.B.*, 398 F.2d 1, 6 (3rd Cir. 1968).

That the Seventh Circuit court of appeals employed the "arbitrary and capricious" standard, is evidenced by its finding that". . . the record in this case supplies no rational basis for the comptroller's conclusion. . ." (Appendix C, p. 20a)

Moreover, due to the fact that the judicial review of the Comptroller's decision is governed exclusively by the Administrative Procedure Act, the plaintiff is not entitled to trial de novo. *Bank of Commerce of Laredo* v. *City National Bank of Laredo,* 484 F.2d 284, 289 (5th Cir. 1973).

And "In such cases, the appellate court must render an independent decision on the basis of the same administrative record as that before the district court; the identical standard of review is employed at both levels; . . ." *First National Bank of Fayetteville* v. *Smith,* 508 F.2d 1371, 1374, (8th Cir. 1974) cert. denied, 44 L.Ed.2d 86.

The plaintiff herein was not entitled to a de novo trial. The appellate court is restricted to the same standard of review as the trial court. The Seventh Circuit applied a standard which places it in conflict with the Eighth Circuit.

While the Seventh Circuit mentioned this standard for review, (Appendix C, p. 17a), it chose instead to substitute its own judgment of whether or not a town existed for that of the Comptroller on that issue. The Seventh Circuit Court of Appeals in its opinion acknowledged the following:

1. That "the sole issue is, whether the Comptroller's decision that the proposed site of the branch was a 'town' within the meaning of the Indiana branch banking law, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Appendix C, p. 15a)
2. That "the Comptroller determined that the proposed site of the Monterey Bank branch was a 'Town'." (Appendix C, p. 15a)
3. That "along the highway in the vicinity of the branch site are 25 houses." (Appendix C, p. 17a)
4. That "the Comptroller's opinion properly considers the three cases in which the definition of 'town' under the Indiana Branch Law is discussed." (Appendix C, p. 19a)
5. "That on the basis of these decisions the Comptroller properly observed that the question whether a site is in a town is for case by case determination." (Appendix C, p. 20a)
6. That "the Comptroller properly rejected the notion that 'there is a fixed population or number of commercial enterprises which establish minimum requirements for the existence of a 'town'." (Appendix C, p. 20a)
7. That "the Comptroller issued a written opinion, explaining why the proposed site satisfied the 'town' requirement of Indiana law." (Appendix C, p. 18a, Note 8). Said opinion stated in substance:
   A. The proposed office will be located outside the incorporated municipality of Winamac.

B. There are 25 residences within one-half mile of that site which form a linear cluster along the west side of U.S. Highway 35 all being outside of the corporate limits of Winamac.

C. In addition to the residential concentration there are at least four commercial establishments within the linear cluster.

8. That the Seventh Circuit "cannot say that twenty-five residences would never be adequate to constitute a town". (Appendix C, p. 22a)

9. "The area at issue here, however, has only four businesses, all of which specialize in serving agricultural needs. The area does not contain one establishment to serve the daily needs of the population in the immediate area such as a grocery store, a gas station, a drug store, a post office, a courthouse, a hospital, or an industrial or shopping center employing a number of residents. *We do not imply that the area must contain any specific type of business.*" (emphasis added) (Appendix C, p. 22a)

10. The court found conflicts in the evidence as to future development; failed to acknowledge that the Comptroller recognized potential future growth (Appendix C, p. 23a); and substituted its judgment for the Comptroller's judgment by stating that the consideration of future development would not have supplied a basis for the Comptroller's decision. (Appendix C, p. 23a). Cf. Appendix A, p. 8a (Comptroller's Conclusion).

On the first eight of the foregoing findings, the Seventh Circuit consistently was in accord with the Comptroller's application of the facts to the Indiana law. Those matters contained in paragraphs 9 and 10 above, however, are the particular matters wherein the Seventh Circuit lost focus of the standard of review as is stated in *First National Bank of Fayetteville* v. *Smith,* supra. The Seventh Circuit substituted its judgment on those matters for that of the Comptroller. The Seventh Circuit failed to resolve the conflicts in favor of the Comptroller as required. Cf. *First National Bank of Fayetteville* v. *Smith* at 1378.

Moreover, the Seventh Circuit in setting aside the Comptroller's decision did not find that the plaintiff met "*that heavy burden of proving the Comptroller's action was willful and unreasoning action, without consideration and is disregard of the facts or circumstances of the case.*" (Cf. *First National Bank of Fayetteville* v. *Smith,* 508 F.2d at 1376. (emphasis added)

Further, the Seventh Circuit failed to follow the very narrow standard of review as laid down in the *First National Bank of Fayetteville* v. *Smith,* 508 F.2d 1371, (8th Cir. 1974), cert. denied, 95 Sup. Ct. 1655, where the Eighth Circuit stated:

> "Reviewing the record
>
> [7-9] The "arbitrary and capricious" standard of review is a narrow one. Citizens to Preserve Overton Park, Inc. v. Volpe, supra., 401 U.S. at 416, 91 S.Ct. 814. Its scope is more restrictive than the "substantial evidence" test which is applied when reviewing formal findings made on a hearing record. See Camp v. Pitts, supra., 411 U.S. at 141, 93 S.Ct. 1241; Webster Groves Trust Co. v. Saxon, supra., 370 F.2d at 387; Charlton v. United States, 412 F.2d 390, 398 (3rd Cir. 1969) (Stahl, Circuit Judge, concurring).

"Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any national basis." Carlisle Paper Box Co. v. N.L.R.B., 398 F.2d 1, 6 (3rd. Cir. 1968). Something more than mere error is necessary to meet the test. N.L.R.B. v. Parkhurst Manufacturing Co., 317 F.2d 513, 518 (8th Cir. 1963). *To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case* • • •" 73 C.J.S. Public Administrative Bodies and Procdure §209 at 569 (1951)." 508 F.2d at 1376 (emphasis added.)

It is evident that the reviewing court substituted its judgment for that of the agency. The Court in *Fayetteville*, supra. at 1378, stated:

"[11-14] It is well established that in rendering a decision on the basis of such an administrative record the reviewing *"court is not empowered to substitute its judgment for that of the agency."* Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 416, 91 S.Ct. at 824. See also Webster Groves Trust v. Saxon, supra; Sterling National Bank of Davie v. Camp, 431 F.2d 514 (5th Cir. 1970). cert. denied, 401 U.S. 925, 91 S.Ct. 879, 27 L.Ed.2d 829 (1971)" (Emphasis added).

Further, the Seventh Circuit failed to resolve the conflicts in the evidence in favor of the Comptroller, as was held in *Fayetteville*, supra. at 1378.

"It is in this respect that the District Judge erred, for rather than resolving the evidentiary conflicts in favor of the Comptroller's action, he independently weighed the evidence and reached his own conclusions. Cf. Unimed, Inc. v. Richardson, 147 U.S. App. D.C. 368, 458 F.2d 787, 789 (1972); Jaeger v. Stephens, 346 F.Supp. 1217, 1225 (D.Colo. 1971);

First Citizens Bank and Trust Co. v. Camp, 281 F. Supp. 786, 791-792 (E.D.N.C. 1968), aff'd 409 F.2d 1086 (4th Cir. 1969)."

The Seventh Circuit has applied a different standard of review than that announced and followed in the Eighth Circuit, thereby placing the Seventh and Eighth Circuits directly in conflict on the same matter, i.e., review of administrative action of the same nature, and setting aside the administrative action without the necessary finding that the Comptroller's action was "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case" *Cf First National Bank of Fayetteville,* supra at 1376.

2. The decision below directly conflicts with the principles enunciated by the Indiana Supreme Court in *Pendleton Banking Company* v. *Department of Financial Institutions*, 257 Ind. 363, 274 N.E.2d 705 (1971), concerning the determination of the existence of a "town" within the Indiana branch banking statute.

According to federal banking law, state law governs the ability of a national bank to establish branches. The Comptroller of the Currency may not approve a national bank branch if state law prerequisites are not satisfied. 12 U.S.C.A. §36(c)(2); (Appendix E, p. 28a) *First National Bank of Logan* v. *Walker Bank & Trust,* 385 U.S. 252 (1966).

The Indiana law on branch banking, set forth in Indiana Code §28-1-17-1 (Appendix F, p. 29a), permits banks to open branches in the same county in which the bank has its principal office, if the branch is located in a city or town, and no other bank is located in that city or town. The Indiana Supreme Court has announced its definition of what constitutes a "town" within In-

diana Code §28-1-17-1 in *Pendleton*, supra. A town, for branch banking purposes, includes "*a compact area having a number of persons living in close proximity to one another with some degree of business transacted within the area.*" 274 N.E.2d at 708. (emphasis added).

The Seventh Circuit Court of Appeals found no town to exist, saying:

> "(T)he record before the Comptroller contains no basis for the conclusion that the area in question has an identity separate from Winamac or that it serves as a commercial or population center." (Appendix C at page 22a).

The Court further characterized the type of businesses that served the area as only serving agricultural needs, and listed the types of businesses the area did not have, to justify its conclusion. The Seventh Circuit stated:

> "We cannot say that twenty-five residences would never be adequate to constitute a town. The area at issues here, however, has only four businesses, all of which specialize in serving agricultural needs. The area does not contain one establishment to serve the daily needs of the general population in the immediate area, such as a grocery store, a gas station, a drug store, a post office, a courthouse, a hospital, or an industrial or shopping center employing a number of area residents. We do not imply that the area must contain any specific type of business. Neither the tiny population nor the small and specialized commercial community, however, would attract sufficient traffic from surrounding areas to warrant a finding that the site serves as a hub for the surrounding area, or more specifically, a finding that the area would provide any support for a full-service branch facility." (Appendix C, p. 22a).

The Court apparently does not recognize that agricultural needs must be serviced daily in an agricultural community, and that a farm supply store, nursery, cattle lot and veterinary clinic are vital to a farming community and, as such, are a hub to that farming community.

The Seventh Circuit decision employes the *Pendleton* requirements for the existence of a town for branch banking purposes. *Pendleton* does not require any specific type of business to be present, only *some* degree of business. See *Albion National Bank* v. *Department of Financial Institutions*, 355 N.E.2d 873 at 876 and 877, (1976). *Pendleton* does not require the area to act as a commercial or population center, it only requires a number of persons living in close proximity, with some degree of business. See *Albion*, supra. *Pendleton* does not require the area to have a separate identity. See *Alboin*, supra.

Yet, the Seventh Circuit Court of Appeals clearly and unequivocally stated the controlling Indiana law and agreed with the Comptroller in its opinion when it stated:

> ". . . Furthermore the Comptroller properly rejected the notion that 'there is a fixed population or number of commercial enterprises which establish minimum requirements for the existence of a town'." (Appendix C, p. 20a)

However, after recognizing the holding of the Supreme Court of Indiana (*Pendleton*, supra) the Seventh Circuit created a conflict with the prevailing Indiana Law when it engrafted a third requirement to the Indiana Law, ". . . but at least it should have a separate identity." (Appendix C, p. 21a). In this, the Seventh

Circuit has decided an important State question in conflict with applicable State law.

This fact alone meets the requirements for the issuance of a Writ of Certiorari pursuant to Supreme Court Rule 19. However the remedy of granting a writ under circumstances is not necessarily adequate when the circumstances are considered. This case cries out for the more expedient remedy available to the petitioner under the circumstances and under the authority of this court, *SUMMARY REVERSAL* pursuant to Title 28 U.S.C.A. §2106.

Summary reversal should issue from this court because reversal is the proper remedy, and the special facts of this case clearly warrant it.

Summary reversal is an extraordinary remedy, for which the proponent has a heavy burden of demonstrating both that his remedy is proper and that the merits of his claim so clearly warrant relief, as to justify expeditious action. *Vietnam Veterans Against the War/ Winter Soldier Organization* v. *Morton*, 506 F.2d 53 (D.C. Cir. 1974).

According to the court in *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, (D.C. Cir. 1971), the Supreme Court's function extends to disposition on a motion for summary reversal when the critical issue in cases of public moment, and the appraisal of the possibility of irreparable harm to the public interest depend on the applicable premise. The case need not be free of troublesome issue; it only need be in the public interest for expeditious handling of the case, and that the case is ripe for decision and unlikely to turn significantly on fact finding or further legal research.

This case is one Ripe for summary reversal due to the procedural posture of the case, the impact of the decision below on the public, and its impact on the parties. The case is, therefore, ripe for this form of relief, should it be granted, in light of *Natural Resources*. The nature of the order below (Appendix D, p. 27a) pursuant to the Seventh Circuit mandate, to close the bank branch, to cease all banking activity, and for the authority to do banking to be revoked, puts both the Monterey Bank and its customers in a perilous position. The Bank is in serious danger of losing the confidence of its depositors, as well as their business.

Moreover, the position of the Monterey Bank as a financial institution in the community will be eroded, with deposits being diverted to other institutions while this Court reviews the decision below. This time period of delay would cost the petitioner irreparable and irretrievable damage. Were certiorari to be granted, with a subsequent reversal of the unfavorable result below, the petitioner would be damaged substantially by the delay. This is especially true in light of the above arguments that show reversal on the issues is clearly the correct result.

CONCLUSION

For these reasons and on the cited authority, the petitioner's request for summary reversal should be granted, or in the alternative, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COMPTROLLER OF THE CURRENCY IN RE THE APPLICATION OF FIRST NATIONAL BANK OF MONTEREY, MONTEREY, INDIANA, TO ESTABLISH A BRANCH OFFICE IN AN UNINCORPORATED PORTION OF MONROE TOWNSHIP, PULASKI COUNTY, INDIANA

I. *Introduction*

By application dated August 18, 1976, First National Bank of Monterey (hereinafter "First National") sought the permission of the Comptroller of the Currency to establish a branch office in an unincorporated portion of Monroe Township, Pulaski County, Indiana, located approximately one-eighth mile north of the corporate limits of Winamac, Indiana, along U.S. Highway 35. The application was accepted for filing on August 24, 1976, and notice of such acceptance was sent to the state supervisory authority and competing commercial banks in the area. Notice of the application was also published in a newspaper of general circulation in the Winamac area.

First Union Bank and Trust Company of Winamac (hereinafter "First Union") protested the application. As a protestant, First Union was given an opportunity to present its views to the commissioned national bank examiner conducting a field investigation of the application and at a public hearing convened at the Office of the Regional Administrator of National Banks for the Fourth National Bank Region in Cleveland, Ohio. In addition, First Union was given the opportunity to file written submissions in support of its position.

The administrative record compiled on the application (consisting of the application and supporting information, all data and information submitted by interested parties in favor of or opposed to the application, the re-

port of the investigating national bank examiner, the transcript of the public hearing, and the recommendations and analyses of Regional and Washington senior staff members) was submitted to the First Deputy Comptroller for operations[1] for disposition, and the application was approved on May 26, 1977.

On June 9, 1977, First Union commenced an action[2] seeking to overturn the approval of First National's application on the grounds *inter alia* that such approval violated the provisions of 12 U.S.C. §36(c) and applicable Indiana law. A hearing was held before United States District Judge Allen Sharp on September 16, 1977, at which time the Court remanded the matter to the Comptroller (1) to reopen the administrative record on the sole issue of whether the proposed branch would be located in a "town" as that term is used in the applicable Indiana branch banking statute and (2) to ". . . make and state [his] conclusions with reference to that subject and the legal bases for those conclusions."[3]

In compliance with the Court's order, this Office established a procedure by which First National and First Union were both given the opportunity to submit written materials in connection with the limited reopening of the record and to submit written materials to rebut opposition submissions. Both parties took advantage of that opportunity and supplied this Office with a substantial amount of information. The information contained in the original administrative record as well as the information supplied by the parties in connection with remand procedures now forms the basis of this opinion.

---

[1] The Acting Comptroller of the Currency, pursuant to 12 U.S.C. §4, delegated the authority to grant approval of applications to establish branch offices to the First Deputy Comptroller for Operations on August 5, 1976. Such delegated authority was in effect on May 26, 1977.

[2] *First Union Bank & Trust Company of Winamac* v. *Bloom, et al,* Civil No. S77-0095 (N.D. Ind., filed June 9, 1977).

[3] Transcript at p. 57.

II. *Analysis*

A. *Statutory Scheme*

A national bank is expressly authorized to establish and operate a branch office ". . . with the approval of the Comptroller of the Currency . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."[4]

A state bank in Indiana may establish a branch office ". . . in any city or town within the limits of the county in which the principal office of such bank or trust company is located, if there is no bank or trust company located in such city or town."[5] Accordingly, there is no legal impediment to First National's proposed branch office if it is located in a "town" in the same county as its principal office and in which no other bank operates a principal office.[6]

In that the Court's order reopening the record did not extend to the question of public convenience and advantage, that issue has not been discussed here. The original administrative record amply demonstrates, however, that First National's proposed branch office will serve and promote the public convenience and advantage.

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[4] 12 U.S.C. §36(c).

[5] Ind. Code Ann. §28-1-17-1 (Burns).

[6] There is no dispute over the fact that First National's principal office and its proposed branch office are both within Pulaski County. Further, there is no dispute over the fact that First Union's principal office is within the corporate limits of Winamac and First National's proposed branch office is outside the Winamac boundary and accordingly not in the same town in which First Union operates its principal office. Thus, the sole focus here is whether First National's proposed branch office will be located in a "town."

B. *Judicial Construction*

It is initially clear that a "town" may be either an incorporated or an unincorporated area.[7] Thus, the inquiry is not foreclosed by the fact that the proposed branch office would not be located within an incorporated town. Indeed, the Supreme Court of Indiana in *Pendleton* upheld the state banking authority's approval of an application filed by the Citizens Bank of Elwood to establish a branch office in an unincorporated area of Madison County less than one-half mile from the incorporated town of Pendleton. In holding that the area in which the proposed branch office would be located was a "town," the Court established several important principles:

(1) A "town" within the meaning of the Indiana branch banking statute may include ". . . a compact area having a number of persons living in close proximity to one another with some degree of business being transacted within the area."[8]

(2) The question of whether or not a particular area is a "town" is one of fact which requires a case-by-case determination.[9]

(3) An unincorporated "town" may be located adjacent to an incorporated town and yet be distinct therefrom.[10]

(4) An unincorporated "town" need not include a church, school, or fire department.[11]

Significantly, the Indiana Supreme Court expressly rejected the contention that there is a fixed population or

[7] *Pendleton Banking Company* v. *Department of Financial Institutions*, 274 N.E.2d 705, 708 (Ind. 1971) (hereinafter "*Pendleton*").

[8] 274 N.E.2d at 708.

[9] *Id.*

[10] 274 N.E.2d at 709.

[11] *Id.*

number of commercial enterprises which establish minimum requirements for the existence of a "town."[12]

The foundation established by the Indiana Supreme Court was reaffirmed in a case arising out of the Comptroller's approval of an application filed by the Mercantile National Bank of Indiana to establish a branch office in an unincorporated area of Lake County adjacent to the city of Crown Point.[13] The Court reaffirmed the principle that ". . . each case would require a factual determination as to whether the area could be considered a town, but that a positive determination was not dependent upon the existence of any number of people or certain facilities."[14] In addition, the Court established several important principles:

(1) The Comptroller may take into consideration future development in determining whether an area is a "town."[15]

(2) The use of city water and sewage services and voluntary compliance with city planning and zoning policies will not preclude an unincorporated area from being a "town" distinct from the city.[16]

(3) A district court, in reviewing the Comptroller's approval of a branch application, may not substitute its discretion for that of the Comptroller but may overturn the Comptroller's action only if, on the basis of the administrative record, such action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[17]

[12] 274 N.E.2d at 708.

[13] *First National Bank of Crown Point* v. *Camp*, 463 F.2d 595 (7th Cir. 1972) (hereinafter "*Crown Point*").

[14] 463 F.2d at 597, n. 4.

[15] 463 F.2d at 597.

[16] 463 F.2d at 598-595.

[17] 463 F.2d at 599-600.

The Court sustained the Comptroller's approval of the application on the grounds that the administrative record reflected that the planned construction of a new "... court house would '[p]rovide a nucleus for the generation of new service, business, and commercial establishments."[18] Thus, the Court specifically approved the Comptroller's consideration of planned development, both in the foreseeable and the distant future, in connection with determining whether a "town" exists.

The most recent reported decision of an Indiana intermediate appellate court arose out of the state banking authority's approval of an application filed by the American State Bank of Ligonier to establish a branch office in an unincorporated area of Noble County adjacent to the incorporated town of Albion.[19] The state court found that the area in which the proposed branch office was to be located consisted of four distinct clusters each of which lacked any nexus to the others.[20] The intermediate appellate court overturned the state supervisor's approval of the application on the grounds that the one distinct cluster in which the proposed branch office was to be located did "... not constitute a number of persons living in close proximity of one another."[21] The court reported that the cluster contained three houses, a saddle club and farm house, a church, a veterinarian, and several businesses.[22]

It is clear, therefore, that a "town" is a single compact area, regardless of proximity to an incorporated municipality, having a number of persons living in close proximity to one another in something more than three houses, with some degree of business being transacted

[18] 463 F.2d at 597, n. 2.

[19] *Albion National Bank* v. *Department of Financial Institutions,* 355 N.E.2d 873 (Ct. App. Ind. 1976).

[20] 355 N.E.2d at 877.

[21] 355 N.E.2d at 877.

[22] *Id.*

within the area, and such "town" need not resemble any other "town" with respect to population or commercial activity. In addition, one may look to the future and take into account proposed developments, both commercial and residential, when determining whether a particular area is a "town."

C. *Facts and Circumstances Surrounding First National's Application*

Although there is some dispute as to the exact distance of First National's proposed branch from the boundary of the incorporated town of Winamac, both First National and First Union agree that the proposed office will be located outside the incorporated municipality.[23] At the time of First National's application, there were twenty residences in the vicinity of the proposed branch site. Supplemental information indicates that there are now twenty-five residences within one-half mile of that site. These residences form a linear cluster along the west side of U.S. Highway 35 north of the corporate limits of Winamac.

In addition to the residential concentration, there are at least four commercial establishments within the linear cluster: a veterinarian, a garden center, a farm supplier, and a stockyard. A fifth commercial establishment apparently straddles the corporate line so that the lot upon which it is situated lies partly within and partly without the corporate boundary.

The supplemental information provided by First National and First Union reveals a dispute as to future development in the area. First National has supplied materials which indicate that the owner of a tract of

[23] There is no requirement that two "towns" be separated by any specific distance under Indiana law. Indeed, the unincorporated "towns" in both *Pendleton* and *Crown Point* were adjacent to incorporated communities. *See,* 274 N.E.2d at 707 and 463 F.2d at 596, respectively.

land along U.S. Highway 35 is in the process of developing his property and has made initial contact with several enterprises in this regard. The materials furnished by First Union indicate that, at this time, there are no definite plans or commitments on the part of any of these enterprises to locate in the area and that the development plans are, at best, in their initial stages. Assuming that the developer's plans ultimately reach fruition, the linear concentration along U.S. Highway 35 will include a bowling alley, Pizza Hut, beauty shop, and home improvement store. As of the filing of the supplemental information, however, no building permits or zoning variances permitting this development had been issued.

III. *Conclusion*

In that the area in which First National's proposed branch office will be located consists of a linear cluster of from twenty to twenty-five residences and four existing businesses along U.S. Highway 35 north of the corporate limits of Winamac, I conclude that such proposed branch office will be located in a compact area having a number of persons living in close proximity to one another with some degree of business being transacted within the area, *i.e.* within a "town." The potential for future residential and commercial development within that area, albeit only in its initial stages at present, serves to reaffirm my decision.

/s/ JOHN G. HEIMANN
John G. Heimann
Comptroller of the Currency

Dated: December 20, 1977

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

FIRST UNION BANK AND TRUST COMPANY OF WINAMAC, INDIANA,

Plaintiff,

v.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENTY, and FIRST NATIONAL BANK OF MONTEREY,

Defendants.

No. S 77-95

• • (Filed Mar 14 1978) • •

MEMORANDUM AND ORDER

This action arises out of the approval of the Comptroller of the Currency of the United States (hereinafter "Comptroller") of an application filed by First National Bank of Monterey (hereinafter "First National") to establish a branch office in an unincorporated portion of Monroe Township, Pulaski County, Indiana, and is presently before the Court on cross motions for summary judgment. These cross motions have been briefed and oral argument has been heard.

The sole issue now raised by plaintiff is whether the Comptroller's conclusion at First National's proposed branch office will be located in a "town" should be overturned.

It is the function of this reviewing Court to determine whether, on the basis of the administrative record before the Comptroller, the Comptroller's decision has such a basis in the record that it should be upheld or has no

basis in the record so that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and should be overturned. *Camp* v. *Pitts,* 411 U.S. 138 (1973); *First National Bank of Crown Point* v. *Camp,* 463 F. 2d 595 (7th Cir. 1972).

A "town" for the purposes of the Indiana Branch Banking statute includes ". . . a compact area having a number of persons living in close proximity to one another with some degree of business being transacted within the area." *Pendleton Banking Company* v. *Department of Financial Institutions,* ..... Ind. ....., 274 N.E. 2d 705, 708 (1971).

The Indiana Supreme Court apparently rejected any test that calls for a listing or comparison of such factors as schools, fire departments, churches, etc., and held that the sole test of whether an area is a "town" requires only an examination of population and business activities. The defendant Comptroller found that the record indicated that the area in which First National's proposed branch would be located consisted of ". . . a linear cluster of from twenty to twenty-five residences and four existing businesses along U.S. Highway 35 north of the corporate limits of Winamac. . . ." Comptroller's opinion at 7. Applying the sole test prescribed by the Supreme Court of Indiana, the defendant Comptroller concluded that First National's ". . . proposed branch office will be located in a compact area having a number of persons living in close proximity to one another with some degree of business being transacted within the area, i.e. within a 'town.'"

The existence of a "town" is ". . . *not* dependent upon the existence of any number of people. . . ." *First National Bank of Crown Point* v. *Camp, supra,* 463 F. 2d at 597, (emphasis added).

The area in question is not in a highly concentrated urban setting, but rather in a less-concentrated rural setting, served by a single highway. The residences and businesses

in the area in which First National proposes to establish its branch office are clustered in two parallel lines along each side of the highway rather than in some other configuration. Indiana law does not require that a "town" possess any particular geometric configuration.

The Comptroller's decision was not premised upon future developments in the "town" and expressly recognized that plaintiff furnished materials indicating that ". . . there are no definite plans or commitments on the part of any . . . enterprises to locate in the area and that the development plans are, at best, in their initial stages." Comptroller's opinion at 6. Thus, plaintiff's concern about future development is not relevant since the Comptroller's decision was based upon existing residential and commercial development and not the future.

In this case it might be tempting for this Court to substitute its factual findings for that of an administrative agency. Basic premises of administrative law precent some and this Court will not violate same. This Court might well have found the facts in favor of the plaintiff here. The record permits the Comptroller to have made the factual decision here and such is within the decisional law of Indiana on the concept of "town." So this Court will exercise restraint and will not disturb the Comptroller's administrative decision.

The plaintiff's motion for summary judgment is DENIED. The defendants' motion for summary judgment is GRANTED. Each party will bear its own costs.

Enter March 14, 1978.

/s/ Allen Sharp
Judge, United States District Court

UNITED STATES DISTRICT COURT

for the

Northern District of Indiana

Civil Action File No. S77-0095

FIRST UNION BANK AND TRUST COMPANY OF WINAMAC, IND.,

vs.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY and FIRST NATIONAL BANK OF MONTEREY.

JUDGMENT

This action came on for (hearing) before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that Plaintiff's Motion for Summary Judgment is DENIED. Defendants' Motion for Summary Judgment is GRANTED. Each party will bear its own costs.

Dated at South Bend, Indiana, this 14th day of March, 1978.

Richard E. Timmons
Clerk of Court
By Terece M. Henkle
Deputy Clerk

APPENDIX C

Opinion by Judge Pell

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

June 15, 1979

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. FRANCIS C. WHELAN, *Senior District Judge**

No. 78-1487

FIRST UNION BANK AND TRUST COMPANY OF WINAMAC, INDIANA,

Plaintiff-Appellant,

vs.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY, and FIRST NATIONAL BANK OF MONTEREY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

Civil Action No. S 77-0095

ALLEN SHARP, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this court filed this date.

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* Senior District Judge Francis C. Whelan of the Central District of California is sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 78-1487

FIRST UNION BANK AND TRUST COMPANY OF WINAMAC, INDIANA,

Plaintiff-Appellant,

vs.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY, and FIRST NATIONAL BANK OF MONTEREY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

Civil Action No. S 77-0095

ALLEN SHARP, *Judge.*

ARGUED NOVEMBER 2, 1978—DECIDED JUNE 15, 1979

Before FAIRCHILD, *Chief Judge,* PELL, *Circuit Judge,* and WHELAN, *Senior District Judge.**

PELL, *Circuit Judge.* The plaintiff-appellant, First Union Bank of Winamac, Indiana, (Winamac Bank) brought this action in the district court for declaratory and injunctive relief, seeking to have set aside an order by the defendant Comptroller of the Currency. The order at issue approved the establishment of a branch bank by the defendant First National Bank of Monterey (Monterey Bank) on the east side of U.S. Highway 35 north of Winamac, Indiana. The district court entered summary judgment in favor of the defendants, and the plaintiff Winamac Bank appeals. To decide this case we must

* Senior District Judge Francis C. Whelan of the Central District of California is sitting by designation.

determine whether the Comptroller's decision that the proposed site of the branch facility was a "town" within the meaning of the Indiana branch banking law, Ind. Code § 28-1-17-1, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The statutory background of this case is not complex. According to federal banking law, state law governs the ability of national banks to establish branches. The Comptroller of the Currency may not approve a national bank branch if state law prerequisites are not satisfied. 12 U.S.C. § 36(c); *First National Bank of Logan* v. *Walker Bank & Trust,* 385 U.S. 252 (1966).[1] The standard applicable to this case is set by Indiana law, which permits banks to open a branch if the branch is within the same county where the bank maintains its principal office, if the branch is in a city or town, and no other bank is located in the city or town.[2] Only the requirement that the branch be located in a "city" or "town" is at issue here. The Comptroller determined that the proposed site of the Monterey Bank branch was a "town." The plaintiffs

[1] 12 U.S.C. § 36(c) provides in pertinent part:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

[2] This standard appears in Ind. Code § 28-1-17-1 which provides in pertinent part:

> [A]ny bank or trust company may open or establish a branch bank in any city or town within the limits of the county in which the principal office of such bank or trust company is located, if there is no bank or trust company located in such city or town.

argue vigorously that this determination is contrary to Indiana law.

The proposed site of the Monterey Bank branch is approximately one-eighth mile north of the corporate boundaries of Winamac, Indiana, on the east side of U.S. Highway 35.[3] Also on the east side of the highway, approximately one-quarter mile to the north of the site,[4] is a nursery or garden center. This nursery is the closest business to the proposed branch that is not within the corporate limits of Winamac.[5] A veterinary clinic is located approximately one-quarter mile to the north of the nursery and is also on the east side of U.S. 35. On the west side of U.S. 35, approximately one-half mile to the north of the site, is a farm supply store. Slightly to the north of the supply store on the west side of the highway is a cattle lot. In the area along U.S. 35 north of the corporate boundaries of Winamac, these are the

[3] The record shows that Winamac, Indiana has a population of approximately 2500, approximately 980 residences, over 35 retail stores, 4 schools, 8 churches and some industry. It also has a police department, a fire department, and a hospital.

[4] The plaintiff-appellant's affidavit evidence below described this distance as ½ mile. The Comptroller's opinion, however, indicates that he relied on the distances shown by a map of Winamac and surrounding areas, which was also in evidence, and which shows a smaller distance between the site and surrounding development.

[5] The Comptroller's opinion mentions another business, the "Swirly Top" drive-in restaurant, which is also on the east side of U.S. 35, directly to the south of the branch site. Except for a portion of its lot, however, this establishment lies within the corporate boundaries of Winamac, and cannot be considered as a business establishment in the area containing the branch site for purposes of determining whether the area is a town separate from Winamac. According to the local building inspector, the "Swirly Top" building lies entirely within the Winamac corporate boundaries.

only business establishments within one-half mile of the site.[6]

Also along the highway in the vicinity of the branch site are twenty-five houses with a population of approximately thirty-eight people, eight of whom are minors.[7] The area surrounding the site is not incorporated, nor does it have a name.

We begin our discussion by noting that judicial review of the Comptroller's decision is governed by the APA, 5 U.S.C. § 702(2)(A). We must determine whether the Comptoller's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Camp* v. *Pitts,* 411 U.S. 138, 142 (1973). We must not set aside the Comptroller's determination if it has a rational basis in the record. *Citizens To Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 419-20 (1971). The history of these proceedings, however, is somewhat unusual, and the course of the proceedings affects our review. After Winamac Bank brought this action for review of the Comptroller's decision, the district court remanded the

[6] In fact the President of the Monterey Bank testified that the only other local businesses along U.S. Highway 35 north of Winamac are an airport, approximately 1½ miles to the north of the site, and, farther to the north, a fish and game preserve, a state park, and a campground. In nearby Beardstown, Indiana, are a grocery store and a gas station.

[7] The plaintiff argues that the area contains 20 houses. We find it virtually impossible to determine from the enlarged map submitted to this court by the Comptroller how the Comptroller reached the figure of 25 residences. We shall assume arguendo, that this finding has support in the record, because the difference between 20 and 25 houses is not material to the ourcome of this case. The defendants also argued below that 38 is a "patently absurd" population figure for 25 residences. Other than this conclusory remark, however, no evidence was offered to show a significantly larger population.

case to the agency with directions to reopen the administrative record on the issue whether the proposed branch would be located in a "town" within the meaning of the Indiana statute and to make a written record of the Comptroller's conclusions and the legal basis for those conclusions. This procedure was the proper one for the court to follow when the Comptroller's explanation of its action is inadequate for judicial review. *Camp* v. *Pitts,* 411 U.S. 138, 143 (1973); *Hempstead Bank* v. *Smith,* 540 F.2d 57, 58 (2d Cir. 1976); *Central Bank* v. *Smith,* 532 F.2d 37, 40 (7th Cir. 1976). After consideration of written supplementary materials of the parties, the Comptroller issued a written opinion, explaining why the proposed site satisfied the "town" requirement of Indiana law.[8] Although

[8] The portion of the Comptroller's opinion dealing directly with the proposed site said:

> Although there is some dispute as to the exact distance of First National's proposed branch from the boundary of the incorporated town of Winamac, both First National and First Union agree that the proposed office will be located outside the incorporated municipality. At the time of First National's application, there were twenty residences in the vicinity of the proposed branch site. Supplemental information indicates that there are now twenty-five residences within one-half mile of that site. These residences form a linear cluster along the west side of U.S. Highway 35 north of the corporate limits of Winamac.
>
> In addition to the residental concentration, there are at least four commercial establishments within the linear cluster: a veterinarian, a garden center, a farm supplier, and a stockyard. A fifth commercial establishment apparently straddles the corporate line so that the lot upon which it is situated lies partly within and partly without the corporate boundary.
>
> The supplemental information provided by First National and First Union reveals a dispute as to future development in the area. First National has supplied materials which indicate that the owner of a tract of land along U.S. Highway 35 is in the process of developing his property and has made

our review of the Comptroller's decision would be impossible without it, the explanation before us is to some extent a post hoc rationalization, having been prepared during the course of the litigation, and must be viewed critically. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 420 (1971).[9]

We shall now examine the Comptroller's decision with that caveat in mind. The Comptroller's opinion properly considers the three cases in which the definition of "town" under the Indiana branch law is discussed, *First National*

[8] (Continued)

> initial contact with several enterprises in this regard. The materials furnished by First Union indicate that, at this time, there are no definite plans or commitments on the part of any of these enterprises to locate in the area and that the development plans are, at best, in their initial stages. Assuming that the developer's plans ultimately reach fruition, the linear concentration along U.S. Highway 38 will include a bowling alley, Pizza Hut, beauty shop, and home improvement store. As of the filing of the supplemental information, however, no building permits or zoning variances permitting this development had been issued.

(Footnotes omitted).

The opinion also contains a discussion of the relevant cases which we have not quoted here.

[9] The plaintiff argues that participation of agency litigation counsel in the Comptroller's decision on remand denied it an impartial arbiter and therefore constitutes arbitrary action. We disagree. The plaintiff was not entitled to the protections inherent in formal adjudicatory proceedings. Furthermore, we read the passage from *Overton Park* cited in the text, *supra,* as an anticipation of this argument, and conclude that participation by agency litigation counsel in the remand proceedings merely should result in critical examination by the reviewing court, but certainly does not in itself require reversal.

Bank of Crown Point v. *Camp,* 463 F.2d 595 (7th Cir. 1972); *Pendleton Banking Co.* v. *Department of Financial Institutions,* 274 N.E. 2d 705 (Ind. 1971); and *Albion National Bank* v. *Department of Financial Institutions,* 355 N.E. 2d 873 (Ind. App. 1976).

In *Pendleton,* the Indiana Supreme Court affirmed the determination by the Indiana Department of Financial Institutions that Huntsville, Indiana, was a town emphasizing that Huntsville had several businesses and a rapidly growing population of 250 or more. In *Pendleton* the court described a town for purposes of the Indiana branch bank law as "a compact area having a number of persons living in close proximity to one another with some degree of business being transacted within the area." 274 N.E. at 708.

This definition of the word "town" was repeated by this court in *First National Bank of Crown Point* v. *Camp,* 463 F.2d 595, 597 n.4 (7th Cir. 1972). In *Crown Point* this court affirmed the Comptroller's determination that an area along a highway containing two or three houses, a retail complex, a saddle club, a veterinarian, and a church, was a town for branch banking purposes, although there was an industrial complex one mile to the east, a housing development and restaurant 1.1 miles to the northwest, and a shopping center and mobile home park 1.1 miles to the south.

On the basis of these decisions the Comptroller properly observed that the question whether a site is in a town is for case-by-case determination. Furthermore, the Comptroller properly rejected the notion that "there is a fixed population or number of commercial enterprises which establish minimum requirements for the existence of a 'town.'" Even under this flexible standard, however, the record in this case supplies no rational basis for the Comptroller's conclusion that the site of this branch is in a town within the meaning of the Indiana branch bank-

ing law. The decision of the Comptroller must therefore be set aside.

The Indiana branch banking statute uses "town" in its ordinary sense. Ind. Code § 1-1-4-1, First; *Pendleton, supra.* The word "town" denotes an area which serves to some extent as a hub for surrounding communities, that is, a population and commercial center. Thus, it need not be incorporated or have a name, *id.,* but it at least should have a separate identity. From its use of this term, it is apparent that the Indiana legislature intended to impose a general minimum standard for the type of community that it believed could support a branch facility. This qualitative definition of a town as a center of population and commerce sets the limits on what courts have called a "town," not raw numbers of businesses and people. Furthermore, in restricting branches to towns where another bank is not already located, the legislature has expressed opposition to the use of branch banks as a means of competition:

> The policy which seems to underlie the Indiana statute is that creation of a branch bank is desirable or justifiable as a means of establishing a new local bank facility in a municipality not already so served, but not desirable or justifiable as a means of promoting competition in a municipality where one or more banks are already located.

Marion National Bank v. *Van Buren Bank,* 418 F.2d 121, 124 (7th Cir. 1969). We must guard against a definition of "town" that would subvert these policies.

The cases cited by the Comptroller for the applicable standard incorporate these qualitative elements of the definition of "town." In *Pendleton,* the Indiana Supreme Court had before it a specific finding that Huntsville, Indiana, was an identifiable community separate from the town of Pendleton, 274 N.E. 2d at 709. In *Albion,* the Indiana Department of Financial Institutions referred to the proposed branch site as "a center of business, social,

economic and educational activity".[10] 355 N.E. 2d at 876. Similarly, in *Crown Point,* this court affirmed the Comptroller's decision, which was based in part on the characterization of the courthouse complex as a "nucleus" for the generation of new service, business, and commercial establishments. 463 F.2d at 597 n.2.

In contrast, the record before the Comptroller contains no basis for the conclusion that the area in question has an identity separate from Winamac or that it serves as a commercial or population center. In fact the record in this case compels the conclusion that placement of the branch at the proposed site would subvert the purpose of the Indiana statute, which would forbid location of the branch in Winamac. We cannot say that twenty-five residences would never be adequate to constitute a town. The area at issue here, however, has only four businesses, all of which specialize in serving agricultural needs. The area does not contain one establishment to serve the daily needs of the general population in the immediate area, such as a grocery store, a gas station, a drug store, a post office, a courthouse, a hospital, or an industrial or shopping center employing a number of area residents. We do not imply that the area must contain any specific type of business. Neither the tiny population nor the small and specialized commercial community, however, would attract sufficient traffic from surrounding areas to warrant a finding that the site serves as a hub for the surrounding area, or, more specifically, a finding that the area would provide any support for a full-service branch facility.

We do not mean that Indiana law forbids the creation of a branch that would receive support from more than one town. If the branch site at issue here could fairly be considered a town, the fact that it also served Winamac would not make any difference. *See Pendelton, supra.*

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[10] Although the court in *Albion,* applying *Pendleton,* reversed the Department on the application of the standard to the facts, it did not question the standard itself.

We recognize that the Comptroller uses sophisticated measurement tecniques to determine potential support for a branch bank, and Indiana law certainly does not preclude use of these techniques. The Comptroller, however, must not use these techniques as a complete substitute for the judgment of the Indiana legislature that a branch should be located in an area sufficiently populous and commercialized to be called a town. Thus, even if the Comptroller determined that a branch located along an empty stretch of highway would drawn sufficient business to ensure success from surrounding areas, the Comptroller would nevertheless have to disapprove the branch because it is not located in a town. *See Albion, supra.*

We recognize that future development is a relevant consideration in determining whether an area is a town. *See Crown Point, supra.* The record before us includes some controversy about future development of the area containing the branch site. The Comptroller's opinion mentions this development, but, as we read it, rejects it as a ground for approving the branch and relies solely on the present character of the area. We note, however, that consideration of future development would not have supplied a basis for the Comptroller's decision. None of the developments mentioned in the Comptroller's opinion was sufficiently certain to be established to serve as a basis for finding the area to be a town. These developments were mentioned only in the affidavit of the owner of the parcel of land upon which the proposed branch would be located. As the Comptroller recognized, no building permits had been issued. No zoning variances had been requested or granted. Furthermore, the affidavit of Dennis Gilman, the owner of the beauty shop allegedly proposed for the area, directly rebuts the assertion in the other affidavit that a shop would be located in this area. A letter from Dora Fitz, owner of a 114 acre tract of land adjacent to the site, also contradicts the affidavit, disclaiming any intent to subdivide the tract, which is now used for farming.

Even if the record provided some evidence for the conclusion that the area north of Winamac is a town, we would still doubt the validity of the Comptroller's action. The record contains evidence that the applicant chose this site for the purpose of avoiding the restriction of Indiana law which would not let it do business in Winamac by means of a branch. An aerial photograph of the area in which the site is located shows no natural boundaries between the site and Winamac. The Winamac boundary is merely an arbitrary line drawn through an area of scattered buildings. *Cf. Pendleton, supra,* 274 N.E. 2d at 709 (noting that "aerial photographs show a clear demarcation" between the towns of Pendleton and Huntsville, Indiana). The application of Monterey Bank never refers to the actual site of the branch except when asked for the precise location. The president of the Monterey Bank testified at the agency hearing about the area north of Winamac, but never indicated that the bank considered the area a town with an identity separate from Winamac, with a population and commercial activity within its boundaries that would provide support for the branch. In fact, the president had to be reminded at one point during his testimony that the area contained a cattle lot, one of the four businesses the Comptroller relies on in his opinion. When the application requested a comment on the "economic character of the area to be served," Monterey Bank described Winamac—its industry, its residential population, and its retail establishments. The actual site is only briefly described in the section as containing a farm store, a veterinary clinic, and a drive-in,[11] again without mentioning the cattle lot. Exhibits at the agency hearing consisted of petitions signed by area residents and letters from local businesses urging approval of a branch bank in the Winamac area. Most notably, the Monterey Bank President testified:

[11] We have already noted that the drive-in restaurant lay primarily within the Winamac corporate boundaries.

> So, finally, we just felt that the opportunity was right to move to Winamac, and the last two examiners which we have had, . . . have both indicated that they thought it would be a good move, and after I suggested to them this last time—well, they saw it in the records where they have applied for a branch.

To conclude on the basis of this record that the site of this branch was a "town" with an identity separate from Winamac, the Comptroller had to ignore the common sense meaning of the word. It is impossible for us to believe that the Indiana legislature intended the term to be defined in the disjointed manner of the Comptroller's opinion:

> It is clear, therefore, that a "town" is a single compact area, regardless of proximity to an incorporated municipality, having a number of persons living in close proximity to one another in something more than three houses, with some degree of business being transacted within the area, and such "town" need not resemble any other "town" with respect to population or commercial activity. In addition, one may look to the future and take into account proposed developments, both commercial and residential, when determining whether a particular area is a "town."

The Comptroller's opinion merely incorporated the facts of the cases decided under the Indiana statute, failing to recognize that the legislature had any purpose whatsoever in inserting the word "town." As a result, the term, as applied by the Comptroller, is virtually meaningless.

In conclusion, we note that the applicant submitted in its supplementary statement before the agency that "[t]he failure to grant approval to this application would tend to maintain a strong economic monopoly presently in force. . . . The American free-enterprise system was not built upon this philosophy." The evidence in the record

also shows a prevailing attitude in the Winamac community that it would be desirable to "shop" for the best banking services. The Comptroller apparently agrees with this philosophy and approved the application at least partly for this reason.

Congress, however, has not entrusted the Comptroller with the power to make policy on the subject of branch banking. The policymaking role in this area is given to the state legislatures. The Indiana legislature has determined that it is not prudent to promote competition among banks by means of branches. If the people of Indiana wish to encourage the use of branch banks, the simple answer is to see to it that the General Assembly of Indiana takes appropriate action. Recourse should not be to the courts or the administrative agencies to liberalize the law. For the Comptroller of the Currency to relax these branching standards for national banks would place state banks in a disadvantageous position relative to national banks. This result would subvert Congress' long-standing policy of "competitive equality" embodied in section 36(c) of the federal banking law. *First National Bank* v. *Walker Bank & Trust,* 385 U.S. 252 (1966); *Marion National Bank* v. *Van Buren Bank,* 418 F.2d 121, 123-24 (7th Cir. 1969). Accordingly, the judgment of the district court is reversed.

REVERSED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
Northern District Of Indiana
South Bend Division

FIRST UNION BANK AND TRUST COMPANY OF WINAMAC, INDIANA,

Plaintiff,

vs.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY, and FIRST NATIONAL BANK OF MONTEREY,

Defendants.

Civil Action No. S 77-0095

ORDER

(Filed July 17 1979)

The plaintiff-appellant, First Union Bank and Trust Company of Winamac, Indiana having filed its Motion For Entry of Order on Court of Appeals' Mandate.

And the Court being duly advised in the premises now GRANTS same.

It is therefore ORDERED as follows:

1. The defendant, First National Bank of Monterey, its officers, agents, stockholders, directors, employees and all other persons acting on their behalf, shall, upon receipt of the Order, forthwith stop all banking activity at its Winamac Branch located one-eighth mile north of Winamac, Indiana, on U.S. Highway 35.

2. The defendant, John G. Heimann, Comptroller of the Currency, his officers, agents and employees, shall upon receipt of this Order, forthwith revoke the authority of the First National Bank of Monterey to conduct banking activities as a national bank at its Winamac branch located one-eighth mile north of Winamac, Indiana, on U.S. Highway 35.

/s/ Allen Sharp
Judge, United States District Court

Dated: 7/17/79

APPENDIX E

STATUTES AND RULES PROVISIONS INVOLVED

The national bank breaching statute, 12 U.S.C. §36(c) provides as follows: (relevant portion emphasized)

> "(c) *A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches*: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) *at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.* In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding

> sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock." (Emphasis added)

APPENDIX F

The Indiana branch banking statute, Burns Indiana Statutes Annotated, Code Edition Title 28 p. 161, Indiana Code §28-1-17-1 provides as follows: (relevant portion emphasized)

> "28-1-17-1 [18-1707]. Branch banks.—*In all counties having a population of less than five hundred thousand [500,000] inhabitants, according to the last preceding decennial United States census, or in counties having three [3] or more cities of the second class, except as hereinafter otherwise provided, any bank or trust company may open or establish a branch bank in any city or town within the limits of the county in which the principal office of such bank or trust company is located, if there is no bank or trust company located in such city or town.* In all counties, any bank or trust company may open one [1] branch bank for each two hundred thousand dollars [$200,000] of the capital and surplus of such bank or trust company, actually paid in and unimpaired. In all counties having a population in excess of five hundred thousand [500,000] inhabitants according to the last preceding decennial United States census, and not having

three [3] or more cities of the second class, any bank or trust company may open or establish a branch bank in any city or town within the limits of the county in which the principal office of such bank or trust company is located.

No branch bank shall be opened or established without first having obtained the written approval of the department. The location of any branch bank may be changed at any time when such change of location is authorized by the board of directors of the bank or trust company and approved by the department. *Any bank or trust company desiring to establish one or more branches shall file a written application therefor, in such form, and containing such information as may be prescribed by the department. The department is hereby authorized, in its discretion, to approve or disapprove any application. Before the department shall approve or disapprove any application for the establishment of a branch bank, as herein authorized, it shall ascertain and determine to its satisfaction that the public convenience and advantage will be subserved and promoted by the opening or establishment of a branch bank in the community in which it is proposed to establish such branch bank; in the case of counties having a population of less than five hundred thousand [500,000] according to the last preceding decennial United States census,* or in counties having three [3] or more cities of the second class, *that there is no bank or trust company located in the city or town in which it is proposed to establish such branch bank, if the application is for a permit to open or establish a branch bank in a city or town other than that within which the applicant bank or trust company is located; that the applicant bank or trust company has satisfied the capital and surplus requirements, as hereinabove provided.* No branch bank may be opened if the real estate (as defined in IC 1971, 28-11-5) of the bank or trust company establishing such branch bank will thereby exceed the

capital and surplus of such bank or trust company actually paid in and unimpaired. [Acts 1933, ch. 40, §224, p. 176; 1937, ch. 33, §30, p. 173; 1955, ch. 21, §1, p. 51; 1957, ch. 82, §1, p. 141; 1959, ch. 39, §2, p. 102; 1963, ch. 350, §1, p. 893; 1971, P.L. 394, §30, p. 1819.]" (Emphasis added)

APPENDIX G

5 U.S.C. §702 Right of Review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

APPENDIX H

The scope of review section of the Administrative Procedure Act, 5 U.S.C. §706, provides as follows:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken on the rule of prejudicial error.
>
> Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393."

APPENDIX I

Rule 19 of the Rules of the Supreme Court sets out the considerations governing granting review on certiorari, as follows: (relevant portion emphasized)

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> (b) *Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law;* or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.
>
> 2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

Petition to Oppose

No. 79-417

In the Supreme Court of the United States

OCTOBER TERM, 1979

FIRST NATIONAL BANK OF MONTEREY, PETITIONER

v.

FIRST UNION BANK AND TRUST COMPANY OF WINAMAC, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the court of appeals erred in concluding that the decision of the Comptroller of the Currency was arbitrary and capricious. The Comptroller's decision would have allowed petitioner to establish a branch office in an unincorporated portion of Pulaski County, Indiana.

1. Under the National Bank Act, 12 U.S.C. 36(c), a federally chartered bank may establish branches within the state in which its principal office is located if the establishment of branches is "authorized to State banks by the statute law of the State in question * * *." The purpose of this law is to place federal and state banks on a competitive parity. *First National Bank* v. *Walker Bank*, 385 U.S. 252 (1966).

Under §28-1-17-1 of Ind. Code Ann. (Burns 1973), "any bank or trust company may open or establish a branch bank in any city or town within the limits of the county in which the principal office of such bank or trust company is located, if there is no bank or trust company located in such city or town." Petitioner's principal office and its proposed branch were both located in Pulaski County. Its branch would not be located in a city or town in which a bank was already established. The disputed issue was whether petitioner's proposed branch would be located in a geographical area properly designated as a "town" within the meaning of the Indiana statute.

To answer this question, the Comptroller considered the applicable decisions of the Indiana courts (Pet. App. 4a-7a) and analyzed the demographic characteristics of the location of the proposed branch (*id.* at 7a-8a). The Comptroller concluded that "such proposed branch office will be located in a compact area having a number of persons living in close proximity to one another with some degree of business being transacted within the area, *i.e.* within a 'town' " (*id.* at 8a).

The district court sustained the Comptroller's determination, declining to substitute its views for those of the agency (Pet. App. 10a-11a). See *Camp* v. *Pitts*, 411 U.S. 138 (1973). The court of appeals reversed (Pet. App. 14a-26a). In its view, a "town" must serve to some extent as a center for the surrounding population and should have a "separate identity" (*id.* at 21a). The court concluded that the record in this case contains "no basis for the conclusion that the area in question has an identity separate from [the neighboring City of] Winamac * * * " (*id.* at 22a).

2. The Comptroller believes that the decision of the court of appeals is incorrect because it invalidates a

reasonable administrative determination that the geographical area in question constitutes a "town" under Indiana law. However, while we disagree with the conclusion of the court of appeals, the court purported to apply the correct legal standard.[1] Review in this Court of the court of appeals' application of state law to the facts of this particular case is not warranted. See, *e.g.*, *Burks* v. *Lasker*, No. 77-1724 (May 14, 1979), slip op. 14.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

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[1]Although it failed to give appropriate deference to the views of the administrative agency, the court of appeals utilized the "arbitrary and capricious" standard employed in *First National Bank of Fayetteville* v. *Smith*, 508 F. 2d 1371 (8th Cir. 1974), cert. denied, 421 U.S. 930 (1975). The court below believed that the agency's decision was "arbitrary and capicious" because it did not give proper consideration to the fact that the proposed location for a branch office had no identity separate from the neighboring city of Winamac, Indiana.